United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

1057

75-1075

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P/S

To be argued by
IRVING P. SEIDMAN

IN THE

United States Court of Appeals

For the Second Circuit

No. 75-1057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

IRA FEINBERG,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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No.75-1057

- against -

IRA FEINBERG,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

The appellant IRA FEINBERG appeals from a judgment rendered in the United States District Court, Southern District of New York, (Honorable Morris B. Lasker) whereby the appellant was convicted under count 1 charging a violation of 18 U.S.C. 371, the general conspiracy statute, counts 9, 10, 11, 12, 13 and 14 based upon the security laws of the United States Found in 15 U.S.C. 78j (b), 78 (ff) and Rule 10b-5 [17 Code of Federal Regulations, Section 240.16 b-5] and 18 U.S.C. 2d, and counts 21 to 28 inclusive based on the mail fraud statute 18

U.S.C. 1341 (665a-669a)*. The appellant was acquitted as to Counts 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, 19, and 20 of the indictment.

As a consequence of being found guilty by the jury and the judgment of conviction as aforesaid, the appellan t was sentenced to a jail term of eighteen (18) months to run concurrently under all the counts of which the appellant was found guilty (688A).

There was no written opinion of the Court below.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

A.

Was the appellant deprived of a fair trial when the government did not call a co-defendant as a witness, the name of the co-defendant being Ivan Ezrine, such co-defendant having at the time of trial already plead guilty but not being sentenced at that time; and did the government prevent the appellant from calling such co-defendant, Ivan Ezrine, as a witness by not granting said co-defendant the limited immunity governed by 18 U.S.C. 6002, 6003 and therefore, the said statutes are a deprivation of due process of law and equal protection of the law as found in the due process clause of the 5th Amendment to the Federal Constitution?

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*( )This Refers to the pagination of the appellant's appendix.

B.

Did the Court below err in denying the appellant's pre-trial motion without evidentiary hearing, for the relief set forth therein, including the dismissal of the indictment or suppression of evidence based upon the grounds that the Securities and Exhcnage Commission instututed prior administrative investigatory procedures and civil action, for injunctive and other relief, all in violation of the appellant's right of silence under the 5th Amendment to the Federal Constitution?

C.

Was the indictment multiplicitious in regard to counts 9, 10, 11, 12, 13 and 14 charging the violation of the security laws by mailings and utilizing instrumentalities of commerce to violate said laws and multiplicitious as to counts 21 through 28 charging violation of the mail fraud statute?

D.

Was the Court below correct in depriving the appellant of evidentiary material that would have enabled the appellant to counter hearsay evidence introduced in support of the government's case, such evidence involving a non-testifying co-defendant?

E.

Was there sufficient evidence that the appellant had intended to violate the securities law, the mail fraud statutes and the intent to conspire to violate the aforementioned statutes?

F.

Was the sentencing of the appellant properly imposed?

STATEMENT OF THE CASE
AGAINST THE APPELLANT:

In this case the jury did not have the government's evidence to consider solely, but also a factual defense supported by the appellant's testimony. See U.S. v. Frank, 494 F.2d 145, [Cir. 2d, 1974] at page 153, this Court stating in part that:

> "In passing on the sufficiency of the evidence, the Court had only the prosecution's case, the defense having offered none... But the self-incrimination clause does not elevate a defendant's silence much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version..."

Nor is this the appellant's first visit to this Court for in a civil action brought by the Securities and Exchange Commission, the appellant, together with certain other corporations of which he was an officer, were joined as defendants together with certain of the co-defendants in the indictment herein. One of them was Ivan Ezrine and certain corporations that Ezrine controlled. The indictment herein characterzied Ezrine as "..., an attorney with considerable experience in the

securities business..." (2A). Also jointed in the civil action was Chris Netelkos and Benjamin Werner, defendants herein as well as other parties who names will appear in the government's case as outlined herein.

The civil case is reported under the name SEC v. Manor Nursing Center, Inc., 458 F.2d 1082 [Cir. 2d, 1972].

TESTIMONY

ROBERT CRESPI:

Robert Crespi knew the defendant for the past ten or fifteen years (26A). In the spring of 1969 he met with the appellant and the co-defendant Ivan Ezrine, the experienced securities law attorney (27A). The conversation between these people allegedly related to the sale of stock of the corporation named Manor Nursing Centers, Inc. According to the witness Ezrine propositioned him to subscribe to $25,000 worth of stock of that corporation and later return two-thirds (2/3) of it, after the witness was compensated for his troubles (28A). Werner, the underwriter, did give, at Ezrine's direction, to Crespi $25,000 to subscribe to the stock and the witness was to be listed in the prospectus as a promoter. (Government's Exhibit 1, 2 [28A-30A]). The witness undertook the proposition but never returned the stock or the money to the appellant (31A) except that he purchased the stock with his promoters fee. Later, when the witness was ill, the appellant visited him and told him to ignore Ezrine's request for money or stock (32A).

ALFRED CULLIERE:

Alfred Culliere testified that in 1969 he was an officer of Emerson Nursing Home and that he knew the appellant (34A). In 1968 a corporation of which the appellant was an officer agreed to buy a vacant plot of realty which was zoned for the use of a nursing home and also enjoyed FHA approval for financing. The price was $400,000 (35A, 36A Government's Exhibit 3). The corporate purchaser was named Manor of Emerson (37A). By February 1970 payments were made on the purchase price to the extent of approximately $152,500 (42A, 43A). At that time, approximately $179,000 was due on the purchase price (43A). The parties changed the manner of payments so that the buyer would pay $340,000 in cash and $60,000 in 10,000 shares of unregistered stock (43A, 44A). This was all disclosed in the prospectus-Government's Exhibit 11. The witness apparently was having financial problems at this time and contended appellant told him that he would give him $179,500 provided the witness used the payments from the real estate transaction to buy 10,000 shares of Manor Nursing Center stock at $10.00 a share in the public offering (45A). This offer being refused, the transaction allegedly took another form by way of the appellant giving this witness one

check for $79,000; a second check for $100,000, which was used by the witness Culliere to purchase 10,000 shares of Manor stock in public offering; and a third check being given to the witness as security for the payment of the second check (47A, 48A, Government's Exhibits 4, 5 and 6, 47A-51A). The witness testified that this check was never deposited or used by him. Also received in evidence was Government's Exhibit 7 which was a confirmation for the purchase of the 10,000 shares of stock of Manor Nursing Center, Inc. (51A, 52A).

The prospectus in connection with the offering, Government's Exhibit 11, referred to a purchase of land with the part payment therefor in unregistered stock (56A-59A). But the payment by unregistered stock in regard to the purchase of the realty was distinct and separate from the 10,000 shares ($10.00 per share) that the witness agreed to purchase. In other words, the 10,000 shares of stock at $10.00 a share that was purchased by this witness could be assigned or sold §61A, 62A).

CHRISTOS L. NETELKOS:

Christos L. Netelkos testified for the government (64A). During the cross examination of this witness, the

Court informed counsel that:

> "...You have already established that this man is a forger, a cheat, a liar and a perjurer,..." (127A).

Netelkos' role in the events involved herein is known to this Court if reference is had to the civil case 458 F.2d 1082 at page 1090. Netelkos pled guilty under the conspiracy county of this indictment (64A).

Netelkos, a broker in New Jersey, was a principal of Carlton-Cambridge & Co. who were broker dealers in New Jersey (65A, 66A). Feinberg consulted him in regard to selling the stock subject to the offering giving him the prospectus (59A, 60A). Carlton-Cambridge ultimately became a co-underwriter and was to help sell 30,000 shares (72A). At a later meeting Netelkos explaining the difficulties in selling the alloted 30,000 shares, wanted to enlist other dealers to participate. At that time this witness asked the appellant for extra compensation at the rate of $1.00 a share which he would pocket. According to the witness the appellant agreed (72A-75A). At a third meeting the appellant and Netelkos discussed the mutual difficulties in completing the offering, the appellant allegedly telling the witness that 100,000 shares had yet to be disposed of (75A-77A). Netelkos told the appellant that he wanted to buy an interest in a New York brokerage firm named

Orvis Brothers and needed $250,000 for the purchase of that interest,adding that he could possibly sell the 100,000 shares through Orvis Brothers who were members of the New York Stock Exchange (74A-79A). Netelkos then committed himself to sell the 100,000 shares if the appellant would lend him $250,000, the purchase price of the interest in Orvis Brothers (79A). A month after that meeting this witness admitted he could only sell one-half of the 100,000 shares and this amount through Orvis Brothers. The witness agreed to this and actually did deliver checks at the closing, the witness explaining the various computations underlying the checks he gave (82A-84A).

On February 20, 1970, the closing was held at the National Community Bank of New Jersey (87A, 88A). Netelkos described the transactions that occurred at the closing and the various checks negotiated as well as his role in the closing (90A096A). At the closing Ezrine prepared a written amendment to the prospectus which was characterized as an amendment to the underwriting agreement with Werner, the underwriter. Netelkos also described the purchase of 42,500 shares by his other corporations (97A-100A). Netelkos explained about two checks he delivered which did not clear (111A). The

witness then testified as to his forging of the Swiss bank account. The witness testified as to his prior perjury.

HARRY PIERATOS

Harry Pieratos next testified for the government (129A). This witness maintained a laboratory which performed services for the nursing home maintained by Manor Nursing Centers, Inc. (130A). According to this witness the appellant told him that a $2,000 debt owed to the witness would be satisfied by issuing to the witness 200 shares of stock $10.00 a share (131A). The appellant later had the witness endorse a check payable to the laboratory the witness operated (132A-134A, Government Exhibit 37). These checks represented a payment that the witness's laboratory paid for 200 shares (135A, Government's Exhibit 38).

JACK NAIMAN:

Jack Naiman, also testified for the government (139A). Naiman's role also related to a co-defendant, Delmonico, who was acquitted by the jury. Naiman and Delmonico operated through a corporation known as the Deneso Corp. (139A, 149A).

Naiman had an extensive criminal record (144A, 197-199A). A third principal in the Deneso Corp. was a Mr. Camarrato

who was to share in a portion of the profits (150A). In December 1969 Naiman heard of the Manor Nursing Centers from Ezrine (152A).

Naiman described later meetings between himself and Ezrine but admitted that in some of the meetings the appellant was not present (167A, 168A, 172-174A).

When the checks were received from Deneso they were not cleared because of an insufficiency of funds (183A, 184A, 186A, Government's Exhibits 42, 43). Between February 17th and February 20th this witness spoke to Ezrine and said that Deneso would not have the payments at the closing but would be able to make them later (186A, 187A). Ezrine pointed out to Naiman that $1,100,000 was needed; that Naiman should tell Delmonico to bring checks totalling $1,700,000 and later bank loans would be arranged to cover the checks (187A, 188A). After the closing Delmonico told this witness that he delivered checks in the amount of $1,700,000 and that in turn he received a check made out to Deneso Corporation in the amount of $75,000 from the underwriter, $35,000 cash from the appellant and confirmation slips from Werner for 110,000 shares of stock (189A, Government's Exhibit 42). Ultimately, however, after being unable to receive a bank loan to make good the checks,

these shares were returned to Ezrine (192A, 193A, 195A).

Naiman admitted that through other dealings unrelated to the occurrences involved herein he knew Ezrine and knew his specialty in securities (202A, 203A, 209A, 212A). Naiman admitted that the purchase of stock was directly from Werner, the underwriter (214A, 215A). At meetings with Ezrine, the appellant was not always present (219A, 220A). Naiman acted for Deneso and finalized the arrangement with Ezrine; he could not recall whether the appellant was present at that time (221A-223A, 225A).

BERNARD ORLINS:

Bernard Orlins also testified for the government (244A). He was a friend of the appellant (248A). The appellant never asked him nor did he ever subscribe to the stock (246A). In March 1970 he received two confirmations to the effect that he bought 6,000 shares of the stock and still later received a third confirmation bringing up the total amount of shares to 12,000 (247A, 248A).

Upon speaking to the appellant about these occurrences, the appellant told him of the terms of the stock subscription or offering and added that if the witness sold the shares, the witness could keep the profit, that is the amount of money he received above $10.00 which was the basic amount of each share.

Upon being questioned by the prosecutor as to a Roger Klim, this witness stated that Klim was his wife's brother-in-law and was also a stock broker who sold Manor stock (251A-253A). This witness discussed the stock offering with the appellant (254A, 255A).

BENJAMIN WERNER:

Benjamin Werner, the underwriter, testified (259A). He pled guilty under the conspiracy count of the indictment (260A). In 1969 he was a broker dealer and handled the stock transactions of Ezrine who was also his friend. Ezrine recommended purchases of stock to him (261A0262A). He met the appellant in late 1969 and saw the appellant only two or three times prior to the closing at social events (262A).

As the underwriter, Werner was unsuccessful in selling the particular stock, succeeding only in disposing of 30,000 shares (263A-265A). He told Ezrine of these difficulties (265A, 266A). Two days before the closing, Ezrine told him the date of the closing was February 20, 1970 but the witness pointed out that he only sold 30,000 shares and that this was an impediment to the closing (267A). Ezrine replied that there would be sufficient monies from other persons at the closing (267A). Thus upon Ezrine's direction, he brought certain

checks to the closing payable to the selling stockholders. There were insufficient funds to cover the checks (270A, 271A). Ezrine, he related, also told him that the money he received at the closing would cover the checks he would deliver (271A. Government's Exhibits 54-56, 273A). He described the various payments to the Manor Nursing (272A-274A). Werner also enumerated and described the checks delivered to the selling stockholders at the closing. There being two checks for $89,500, a check for $134,250 payable to Ezrine as attorney for two corporations who were selling stockholders (274A-276A, Government's Exhibits 58, 59). He also described other checks he delivered to the selling stockholders delivering them to Ezrine and the appellant (277A-279A, Government's Exhibits 8, 44, 62, 61, 60 and 63).

When Werner arrived at the closing, at the bank, he asked Bayliss, a bank officer, to hold the checks he was to deliver for a day until the checks he collected would clear and Bayliss agreed (280A, 281A). Werner was represented by counsel at the closing. At the closing initially Werner did not collect all the checks he was supposed to; then the appellant and Ezrine gave their own personal checks to complete

the amount Werner was to collect (281A, 282A). Werner enumerated the checks before the jury given to him and explained how the checks did not clear because of insufficient funds (288A, 293A). However, he did send confirmations (Government's Exhibits 67, 68, 294A, 295A). Feinberg, according to Werner, got a check at the closing for $559,000 which cleared (Government's Exhibit 71, 301A, 302A). As to other checks Werner delivered at the closing he stopped payments on those (301A, 304A).

Werner also threatened Ezrine with exposure. Later Ezrine appeared at his office with a man named Haber (304A-309A). Haber displayed a certified check for $600,000 representing a purchase of 60,000 shares, at$10.00 per share (309A, Government's Exhibit 73, 310A). The next day Haber returned and asked and received from Werner the amount he gave him, this being at Ezrine's direction (311A). Later the appellant and Ezrine spoke to Werner about issuing a check to Manor because the "deadline" for the subscription was March 6, 1970 (313A). Werner then issued two checks for $750,000 and $354,006.89 to Manor (344A, Government's Exhibits 74, 75). Ezrine thereupon prepared a writing stating that the checks to Manor were paid to Manor and this writing was signed by Ezrine and the

appellant (315A, Government's Exhibit 76). Werner testified he was holding the balance of funds. Government's Exhibit 77, another writing signed by the appellant and Ezrine, was characterized by Werner as an effort to conceal the occurrences heretofore described (318A, 319A).

On cross examination Werner admitted that Ezrine in the past gave him his brokerage business and was also a friend of his. Ezrine recommended the attorneys who appeared for Werner at the closing (323A, 324A, 327A-329A). Ezrine also prepared the underwriting agreement (333A). Werner also admitted that he relied upon Ezrine as an attorney (336A, 337A). On February 20, 1970the date of the closing and until December, 1974, he had faith in Ezrine's legal advise (339A). Even after the closing Werner serviced Ezrine's wife's accounts (342A).

Werner admitted he lied during the administrative hearings involving this matter as well as the suit brought by the Securities and Exchange Commission. Not only this, but Werner admitted that he did so relying on Ezrine (343A, 344A). Further, he believed that the letter dictated by Ezrine was true (325A).

DAVID HABER:

David Haber also testified for the government (355A). Haber related that he met appellant on or about February 20, 1970. Ezrine arranged the meeting (355A, 356A). Ezrine asked Haber to buy 60,000 shares of Manor Nursing stock and told him that he would thereafter repurchase them at a $1.00 profit per share (this was characterized as a "put") (356A-358A). In discussing these matters with Ezrine, the appellant did not join in discussion (358A, 362A). Ultimately the witness purchased 60,000 shares in early March 1970 and Ezrine arranged for a "put" to guarantee a repurchase (359A, 360A, Government's Exhibit 28). Haber, the witness, gave Ezrine a certified check for $600,000 (360A). Later Ezrine asked the witness to exercise the "put" so that Ezrine could save $180,000 which was the cost of arranging the "put" (361A).

SEYMOUR WEINER:

Weiner was the accountant. His testimony substantiated that of appellant's. He testified that upon receipt of letters from Ezrine in December, 1970 he advised appellant that Ezrine's legal advise did not sound correct. He adivsed appellant to obtain new counsel.*

*See Trial Minutes, p. 1065-2055.

THE DEFENSE:

The appellant testified that he met Ezrine socially in Florida and then their friendship intensified. Thus he visited Ezrine and his wife at social occasions at their home (364A-367A). Eventually Ezrine suggested to the appellant that he should expand the nursing home business by going "public" (367A-369A). The appellant testified that he told Ezrine that the nursing home he operated was small (369A). Thereafter at Ezrine's direction and advice the appellant garnered information about the equity in the nursing home and formulated plans for expansion. Progressing further, at Ezrine's direction, the appellant gave Ezrine information about his background and other matters that were to be embodied in a prospectus (370A, 371A, 374A, 386A). Thereafter, the appellant purchased land through Culliere and at Ezrine's suggesstion acquired options on other parcels of real property (372A, 373A, 378A). Weiner, the accountant that the appeallant retained at Ezrine's suggestion prepared a financial statement for Ezrine (375A). Ezrine thereafter prepared an underwriting agreement that was entered into by Weiner (376A). At Ezrine's further suggestion, the appellant supplied the names of personnel who were to operate the expanded nursing home and give a background of himself (384A, 385A).

Ezrine's compensation was to be in the sum of $50,000 to be paid at the closing. In other words, the $50,000 fee was on a contingent basis (391A, 392A). Ezrine also arranged for two corporations named Atlantic Services and Glendale Inc. to be the selling stockholders of the Manor stock (393A, 394A). However, Ezrine contributed nothing to Manor Center, Inc. (397A, 398A).

The appellant did not deal with the SEC having entrusted Ezrine with the dealings (402A). Up to October 1969 the appellant never met Werner and Netelkos (404A).

Subsequently in January 1970 Ezrine told the appellant he had trouble selling the stock and told the appellant to use his efforts to sell the stock (406A, 407A).

The appellant met Naiman through Ezrine; he met Netelkos through other borkers than he regularly dealt with (421A-424A). The defendant described his efforts to sell the stock (425A, 428A, 430A, 431A, 432A).

Nor did the appellant ever agree to pay Netelkos a $2.00 bonus for every share of stock he sold (436A, 437A). Instead, after being refused this bonus, Netelkos asked the appellant for a loan of $250,000 so that he could complete an investment in Orvis Brothers (437A-439A).

It was only at the closing February 20, 1970 that the appellant heard of the other corporations Netelkos was an officer of (440A).

In regard to Naiman, when the appellant initially met him Naiman wanted to handle the mortgage financing in regard to the real estate, exclusively (446A-448A). This request was refused by the appellant.

Shortly before the closing Ezrine told the appellant tha he was able to arrange with Naiman a purchase of part of the offering (449A).

Ten days after the closing Ezrine referred to Haber (455A). Ezrine told the appellant that Haber was an affluent investor and wanted to buy some of the stock (457A).

Netelkos at the closing insisted that the checks be deposited in the bank the same dayof the closing and sought written assurance (462A).

When shortages developed at the closing the appellant asked Ezrine whether he could buy some of the stock for his friends and Ezrine replied affirmatively adding that the appellant could do anything he wanted with his money (463A). When the appellant left the closing he believed that it was

successful (464A). After the closing when he was informed that some of the checks did not clear he called Ezrine who told he would take care of Deneso's default but that the appellant should call Netelkos (469A). Netelkos upon being called told the appellant he was having trouble with the bank but he would take care of the matter (470A, 471A).

After the closing Ezrine told the appellant that Haber made a payment of $600,000 for the stock and that he, Ezrine, was arranging for another $600,000 in the following way. A hospital in Daytona Beach was to be sold, but that the payment would be payable in the stock of the corporation (481A, 483A, 484A, Defendant's Exhibit F, 485A).

Further, Ezrine explained to the appellant how all of the stock were sold at the closing (491A-493A).

When Netelkos was confronted with his defaults he explained that he had certain monies in the Swiss bank account and that Netelkos would arrange for a payment of the funds on January 31, 1971 which was the following year (501A, 502A). Netelkos subsequently produced documents which purported verified that foreign account (Government's Exhibit 35, 504A, Defendant's Exhibit T, 508A).

On February 20, 1970 Ezrine billed the selling corporation $50,000 which was his contingent fee.

In regard to Crespi, he socialized with the appellant. He also knew Ezrine (522A). In a conversation between Crespi and Ezrine, Crespi agreed to sell some of the stock of a corporation known as Capital City Nursing Center. Ezrine promised Crespi a fee for his efforts in selling the stock (527A, 528A, 530A). This fee was in the amount of $25,000 and Ezrine told the appellant that it was to come from Werner and that this transaction did not affect the appellant (531A).

Ultimately, the appellant being concerned about the defaults caused by Netelkos went to Europe to ascertain the existence of the Swiss bank account. He went there with his accountant Seymour Weiner and laywer, David Beckerman.

In Switzerland they ascertained that there was no such account (537A-542A, 549A).

The appellant also explained to the jury that he had no intent to defraud anybody (562A). He explained the amount of money received (563A, 564A). Thus in regard to the Daytona hospital transaction, he knew nothing about it except what Ezrine told him (566A).

The appellant also explained the refund he made to that hospital (567A). He also explained monies he gave to the trustee whose capacity originated with the civil suit hereinabove described. He returned the sum of $400,000. At the time of trial the appellant was merely employed at the nursing home (568A). He also explained other restitutions made (570A).

It is also brought to the attention of this Court and not controverted by the Government, that Ezrine who was to get a $50,000 fee which was contingent upon closing (575A).

The appellant retained new counsel in December 1970 upon the advise of Seymour Weiner. He disclosed fully all of the prior happening in the 10K filed with the SEC (553A-556A)*.

The essence of the appellant's testimony was that in good faith he relied upon the representations of people expert in public offerings and securities law.

*See Trial Minutes: Testimony of Seymour Weiner pp.1965-2055.

POINT I:

THE APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS OF LAW FOUND IN THE 5TH AMENDMENT TO THE FEDERAL CONSTITUTION WAS VIOLATED WHEN THE SECURITIES EXHCANGE COMMISSION BROUGHT A CIVIL ACTION AND INSTITUTED ADMINISTRATIVE PROCEEDINGS, INVOLVING THE SUBJECT MATTER UNDERLYING THE INDICTMENT HEREIN, AND THE DEFENDANT'S PRE-TRIAL MOTION SHOULD HAVE BEEN DECIDED ONLY AFTER AN EVIDENTIARY HEARING TO DETERMINE THE ISSUES RAISED BY SAID MOTION

Prior to trial, the defense moved for appropriate relief based on the fact that parallel similar administrative proceedings and civil actions were instituted against the appellant prior to and during the pendancy of the indictment herein (14A, 18A, 19A, 20A). It was argued on the motion that an evidentiary hearing would establish a design on the part of the SEC to institute the administrative and civil proceedings and call Feinberg as a witness to procure evidence to support a criminal prosecution (22A, 23A). It was further argued that the Securities Exchange Commission could have utilized its own investigative resources to support the civil action and did not need the appellant's testimony (22A, 23A). The indictment herein was returned in May , 1973 after the full trial of the civil actions.

It is submitted that the Court below should have granted an evidentiary hearing on the motion to ascertain just

what the Securities Exchange Commission did. The appellant's claim is based on two grounds, the privilege against self-incrimination and the basic fairness required by due process of law all within the reach of the 5th Amendment to the Federal Constitution.

In Kordel v. United States, 397 U.S. 1 [1970), the appellants were convicted for violating the Food and Drug Act. The criminal action was instituted after the commencement of a civil action against the corporation of which the individual defendants were officers. The responses of one of the defendants-were deemed incriminating by the Supreme Court in evaluating the merits of their claim Kordel, supra, at 6. The 5th Amendment claim in that case arose from the service of interrogatories served upon the defendants in the civil action. However, the defendants were given notice in the civil action that the government intended to proceed criminally. The defendants moved in the civil action for a protective order as to the interrogatories. That motion was denied.

In the instant case the SEC at no time during the pendency of its investigation or the civil action disclosed its intent to criminally refer this matter to the United States Attorney.

In Kordel, supra, the Supreme Court of the United States held that the defendants waived the privilege against

self-incrimination. As to whether there would be an available officer who would testify for the corporation or the predicament of an officer being unwilling to testify because of the privilege, that issue was left open as to whether the civil action would have to be postponed until the criminal action was concluded [397 U.S. at page 10]. As to Kordel, the Court held that he never testified and therefore never incriminated himself (at page 10, 11).

But, the Supreme Court further held that there would be a due process claim if such were the case that:

> "We do not deal here with a case where the government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor were the case where the defendant is without counsel or reasonably fears prejudice from an adverse pre-trial publicity or other unfair injury, nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." Kordel, supra at 11-12 (footnotes omitted)

The motion herein if followed by an evidentiary hearing would have considered the use by the government of leads from Feinberg's testimony. See Gordon v. Federal Deposit Insurance Corp., 427 F.2d 578 [C.A., D.C. 1970] at pages 580, 581. As recognized in Kordel, the accused there knew of the

recommendation by the authorities to institute a criminal action. A hearing in this case would have afforded the Court below to make a record as to when the government decided to prosecute the appellant, e.g. before the institution of the administrative investigation and civil proceedings, during the pendency of those proceedings or subsequently. See U.S. v. Churchill, 483 F.2d 268, [Cir. 1st, 1973] at 272 the Court stating in part that:

> "It is, of course, difficult in cases where the government pursues criminal and civil investigations jointly to determine what the government's purpose is, if there is any single purpose..."

It is respectfully submitted that a hearing would have ascertained whether the appellant was ever advised during the pendency of the civil proceedings that the government recommended prosecution or contemplated recommending prosecution. This is particularly applicable since the defendant Ivan Ezrine had been the subject of other then pending SEC investigations.

Notice to the appellant would have given him the right to consider whether to testify in his own behalf or not in the civil action. Further, such notice would have served to alert the appellant to claim his privilege against self-

incrimination. As a matter of fact the ascertion of the privilege against self-incrimination would have aided the government in its civil suit (see SEC v. Stewart, 476 F.2d 755, [Cir. 2d 755[), opinion of Judge Feinberg, at page 757, Judge Feinberg holding that:

> "...In addition, counsel for the principal defendant...stated to us...that his client will not testify unless he is granted immunity and that as to him, the Commission may get the benefit of any inferences to which it therefor might be entitled, should Judge Stewart decide to draw them. ..."

Judge Feinberg also recognized that the competing values involved in instituting parallel proceedings, is a problem which cannot be resolved by general guidelines (at page 758).

Before the ruling in Kordel, and quite distinguishable from the facts in Kordel, is U.S. v. Parrott, 248 Fed. Supp. 196 [U.S.D.C., D.C. 1965). There the SEC brought civil proceedings and pending those proceedings recommended criminal prosecution of the principles. The recommendation was not made known to the appellants. During a hearing in the civil proceedings, a government counsel whose identity was concealed, audited the testimony. At page 202 in granting relief the Court concluded that:

> "The Court holds that the government may not bring a parallel civil proceeding and avail itself of civil discovery devices

to obtain evidence for subsequent criminal prosecution. On the basis of this holding, the Court would have been disposed to decide the degree to which the tainted evidence was the basis for the entire criminal prosecution or grant appropriate motions to suppress..."

In Garrity v. New Jersey, 385 U.S. 493 (1967), the Supreme Court stated:

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." (supra at 498).

The coercive pressure of the SEC caused the appellant to waive his privilege against self-incriminiation.

POINT II:

THE GOVERNMENT PREVENTED THE APPELLANT FROM CALLING EZRINE AS A WITNESS AND THE COURT'S CHARGE IN REGARD TO WITNESSES AVAILABLE TO BOTH SIDES NOT BEING CALLED WAS PREJUDICIAL TO THE APPELLANT.

Ezrine was not called as a witness by either side (413A-415A. 362A2, 579A1, 579A4, 579A5). Thus appellant's counsel argued before the Court that if he could call co-defendant Ezrine as a was witness, Ezrine would claim his right of silence under the 5th Amendment and counsel further submitted that if the United States Attorney called Ezrine, the prosecution could arrange for the granting of statutory immunity.

Appellant's counsel further contended that since immunity could not be granted upon application of the defense, this was a denial of equal protection of the law in regard to the appellant, because the government was able to call Ezrine upon a proper grant of immunity (416A). Therefore, the co-defendant Ezrine was not equally available to appellant.

The Court in charging the jury acknowledged that the jury was concerned about the failure to call co-defendant Ezrine as a witness. The Court instructed the jury that Ezrine was available to either side and neither side called him and therefore the jury could infer that Ezrine's testimony might

have been favorable to either side or the jury was free not to draw any inference and that the jury could determine what inference, if any, to entertain from the failure to call Ezrine (592A, 593A). The role of co-defendant Ezrine in this case was of paramount significance and had crucial affect upon appellant's defense.

It is submitted that Ezrine was not available as a witness to the appellant. Counsel clearly pointed out that co-defendant Ezrine was not available because he would assert a claim under the 5th Amendment right of silence. See U.S. v. Brown, Court of Appeals, 2nd Circuit, February 20, 1975, slip opinion 1847, at page 1857, this Court holding that:

> "Claim is also made by Brown that it was reversable error for the trial judge to instruct that if a witness is 'under equal control' of the parties no adverse inference could be drawn from the failure of the government to produce the witness. If there was an equally available witness this charge might well be error. Here, however, evidence as to the stolen car was equally unavailable to both sides, making an adverse inference against either side impermissible...(omitting citation)..."

It is submitted that Ezrine was available to the government but was not available to the appellant. The jury should have been so instructed.

The 6th Amendment to the Federal Constitution provides for the accused to (a) be confronted with the evidence against him and this includes the right of cross examination, and (b) to summon witnesses. While the right to confrontation is not violated because of a hearsay exception in conspiracy prosecutions or prosecutions involving joint actors, the issue in this case is that the appellant had a constitutional right to summon Ezrine, see Chambers v. Mississippi, 410 U.S. 284 (1973), at pages 294-295.

Furthermore the appellant had a right to procure favorable testimony of an accomplice and Ezrine was an accomplice. See Cool v. U.S., 409 U.S. 100 (1972) at pages 102, 103.

18 U.S.C. 6001 et seq. provides for testimonial immunity being granted to a witness who appears to testify in a court. Under Section 6003 the immunity is provided for upon application of the United States Attorney who has to obtain the approval of the Attorney General or other persons described in subdivision (b) of Section 6003. Subdivision (3) of Section 6002 provides for the type of immunity that may be afforded a witness who enjoys immunity. That immunity is limited to a prohibition of the use of the compelled testimony or any leads therefrom. This statute was held to be in conformity to the 5th Amendment right of silence in Kastigar v. U.S., 406 U.S. 441, (1972).

Therefore, a witness may be available to the government because only the government can secure the immunity. A defendant cannot secure such immunity for a witness he desires to call. Clearly, Ezrine was not available to the appellant. It is respectfully submitted that because of this state of affairs, especially as applied to this case, the appellant was denied equal protection of the law. Equal protection of the law is an element of the 5th Amendment guarantee of due process of law (see Bolling v. Sharpe, 347 U.S. 497, at page 499).

The immunity statutes effectively frustrated the right of the appellant to be confronted with the evidence against him and to summon witnesses.

Putting aside a facial attack of the aforementioned statutes providing for the limited type of immunity at the request of the government on the aforementioned grounds, it is submitted under the concrete circumstances of this case and the application of the statutes to this case, the statutes are rendered invalid as being violative of the 6th Amendment right of confrontation and right to call witnesses, and were a deprivation of equal protection of the law as well as due process of law in regard to the appellant.

This brings us to State v. Broady, July 23, 1974, Ohio Court of Appeals, Franklin County, 16 Criminal Law Reporter, at page 2387. In that case after a conviction the accused moved for a new trial based on newly discovered evidence consisting of testimony of a alibi witness whose testimony would serve as an alibi. The testimony was not forthcoming because the witness would assert the privilege against self-incrimination. The State had an immunity statute. The immunity statute did not provide for both transactional and testimonial immunity, but parallelled the federal statute in that it provided only for "use" immunity.

The Court stated as follows:

> "...does not expressly state that immunity may be granted a witness upon the request in a criminal case. Neither does it expressly state that immunity may be granted only upon the application of the prosecutor..."
>
> "We would point out, however, that the Code of Professional Responsibility...with respect to the duties of the prosecutor speaks in terms of his duty to seek justice, not merely to convict."
>
> "Justice would seem to require that immunity from prosecution based upon the testimony of a witness should not be denied solely because such testimony would tend to exonerate a defendant in the criminal case and be granted only when such testimony would tend to convict the defendant. The key consideration...is whether or not 'interest of jutice' is served by the granting of immunity based on the testimony of a witness, whether such evidence is favorable, or adverse to a defendant in a criminal case."

In regard to the missing witness, Ezrine, it is argued that Ezrine was available to the government and that testimony by the government's other witnesses as to what Ezrine said, was not necessary to the government's case.

Recognizing the hearsay exception in the prosecution of a conspiracy case, see U.S. v. Cirillo, 499 F.2d 872, [Cir. 2d, 1974), Cert. denied U.S. Law Week 331, December 10, 1974. Nevertheless, the hearsay exception did not apply to this case. The government could have called Ezrine and given him the limited immunity hereinabove d escribed. See: 52 Texas Law Review, August 1974, no. 6, page 1167 et seq., pages 1198, 1199 and especially, page 1200.

Of paramount significance to the appellant's defense was his contention that he did not intend to nor did he enter into a scheme to defraud the investing public.

The government in this case artfully secured the testimony of Ezrine through operation of an exception to the hearsay rule thereby circumventing the constitutional right of the appellant to summon and confront Ezrine.

The record herein establishes Ezrine as the central figure in this case who was described by the government as an attorney expert in the securities law practice.

POINT III:

THE GOVERNMENT SHOULD HAVE BEEN COMPELLED TO DISCLOSE ANY MATERIAL IT HAD AS TO EZRINE SO THAT THE APPELLANT COULD HAVE SHOWN INCONSISTENCIES OF WHAT EZRINE MAY HAVE SAID AS COMPARED TO THE DECLARATIONS OF EZRINE THROUGH THE GOVERNMENT'S WITNESSES.

Counsel asked the government to produce "3500" material as to Ezrine. Since Ezrine didn't testify the government and the Court were technically correct in holding that 18 U.S.C. 3500 did not apply. But counsel added "any statement or information" (579A2).

It is submitted that the issue transcended the limitations of 18 U.S.C. 3500. The issue dealt with exculpatory material; see Brady v. Maryland, 373 U.S. 83, 86-88, (1967); Giles v. Maryland, 386 U.S. 66, 1967; Moore v. Illinois, 408 U.S. 786 (1974).

The basic issue dealt with rebutting the hearsay emanating from witnesses as to Ezrine, the unsworn statements attributed to Ezrine by the government's witnesses especially Netelkos, Werner, Naiman and Haber. If 18 U.S.C. 3500 did not apply, then due process of law guaranteed by the 5th Amendment to the Federal Constitution would have mandated the disclosure by the government as to such material that would have

contradicted the hearsay from Ezrine because the government's proof was hearsay under the exception to the hearsay rule. Yet the appellant may have been unable to use other hearsay, that is statements from Ezrine, to contradict the hearsay testified to by the government's witnesses. It is put that the principle underlying the ruling in U.S. v. Borelli, 336 F.2d 376, [CIr. 2nd, 1964) at page 391 applies. There a government witness testified at trial. The defense learned that a government agent testified before the grand jury and related to the grand jury certain statements of this very witness who later testified at trial. It was held on page 391 that:

> "If Rinaldo had testified before the grand jury, the defendant would have been entitled to have the judge inspect the minutes and turn over any parts useful for cross examination...The government ought not to be allowed, by having its principal witness speak to the grand jury through the voice of another, to deprive the defendant of his right to impeach by contradiction.."

Furthermore, 18 U.S.C. 3500 has been considered as a furtherance of the requirements of due process of law. In U.S. v. Gleason, 265 F. Supp. 880, (S.D.N.Y., 1967), it was held by Judge Frankel that the application of the Brady rule

may extend to pre-trial disclosure. Thus Judge Frankel held that due process requirements of furnishing a defendant exculpatory material may extend even to the extent of pre-trial disclosure even if such disclosure would come under the limiting provisions of 18 U.S.C. 3500 mandating disclosure only after a witness testified. Judge Frankel held that the restrictions of 18 U.S.C. 3500 must be reconciled with the demands of due process of law.

It is respectfully submitted that Counsel should have been furnished all material in the possession of the Prosecutor bearing on any and all statements of Ezrine. For this request to be summarily denied by the Prosecutor and the Judge, denied counsel his basic right to effectively cross examine the Government's witness. For it is clear that the Government was able through the co-conspirator hearsay exception to admit into evidence testimony relating to what Ezrine said and did to inculpate the defendant. Yet when counsel asked that any material in the possession of Government relating to these statements be furnished, this request was summarily denied.

POINT IV:

COUNTS 9, 10, 11, 12, 13 and 14 OF THE INDICTMENT CONSTITUTE BUT ONE CRIME and COUNTS 21 to 28 CONSTITUTE THE SAME CRIME ALLEGED IN COUNTS 9 to 14.

Group 2 of the indictment consisting of counts 2-14 were based on the violation of the Securities Law. The appellant was acquitted under all these counts except counts 9, 10, 11, 12, 13 and 14. It is submitted that the entire grouping was a multiplicitious pleading and should have been alleged in one count. This for the reason that the gravaman of the crime is the violation of the Securities Laws. Similarly, it would appear that the mailings of the confirmations and the stock certificates were not individual crimes but merely the jurisdictional basis for the enforcement of the given statute. As was held in U.S. v. Hughes, 195 F. Supp. 794, (D.C.S.C.N.Y., 1961) at page 798:

> "Since the gist of the crime is the fraudulent scheme and the purpose of the requirement that there be a use of the mails or other facilities of commerce is solely to create a basis for federal jurisdiction, the multiple mailings in carrying out the scheme do not constitute separate crimes. Each device to defraud or each obtaining money by false statements or each transaction which operates as a fraud may be a separate crime but not each use of the mails or interstate commerce."
>
> "...For all that appears, all 18 mailings were in a single fraudulent course of conduct alleged and realleged 18 times in the indictment."

It will be noted in that case, that as here, the mailings contained confirmations and stock certificates.

Furthermore, the prefatory paragraph underlying counts 2 to 14 and 15 to 28 alleged that the defendants were involved in a "scheme to defraud" (10A). In other words, it is admitted by the government that there was only one scheme.

As was stated in U.S. v. Greenberg, 30 F.R.D. 164, (D.C.S.D.N.Y., 1962) at page 169:

> "There are not allegations in this indictment of more than a single scheme to defraud. The use of the mails as alleged...are merely steps in the operation of the overall fraudulent scheme described in the four paragraphs preceding the allegations of separate mailings to the victims. Counts...are defective because they fragment a single prohibited course of conduct into a series of separate crimes."

POINT V:

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED WHEN THE COURT IN THE PRESENCE OF THE JURY TOLD APPELLANT'S COUNSEL THAT AN APPEAL COULD BE FORTHCOMING IF COUNSEL WAS DISSATISFIED WITH THE COURT'S RULINGS.

In the presence of the jury the Court in admonishing the appellant's counsel to merely accept a ruling of the Court and added at page 174A of the appendix that:

> "...if anything comes out of this case there is a right of apply to the Court of Appeals. That panel of judges will review my rulings and decide whether I am correct or not..."

In U.S. v. Cirillo, 499 F.2d 872 [Cir. 2d, 1974] at page 889 this Court held that it was unnecessary for a Court in instructing the jury to tell the jury that the Court's rulings were to be accepted by the jury because if the Court were wrong the Court could be reversed.

POINT VI:

THE SENTENCE WAS IMPOSED ILLEGALLY.

Recognizing that this Court does not review the severity or type of sentencing, nevertheless the appellant is constrained to argue that the motivation of the Court in imposing the 18 months concurrent sentence, was questionable.

Werner, who testified for the government was placed on probation.

Ezrine who pled guilty, was given an 18 month concurrent jail term despite the fact that he ad previously been convicted and was under federal indictment for another matter at time of sentencing.

Naiman who had suffered prior convictions, was given a net jail term of four months to be served in a "treatment type institution".

Netelkos who also testified for the government, was given a net jail term of three months to be served in a "treatment type institution".

Ezrine, the lawyer and Feinberg received 18 months.

It is submitted that the Court had a fixed or rigid policy in imposing a sentence upon the type of offender that

Feinberg was. That the source of this rigid policy was the particular background of persons like Feinberg and Ezrine.

The Court indicated that it believed in short sentences (685A, 686A). The Court further stated that it was not imposing the jail term because of "individual deterrance".

However, the Court also noted that:

> "...I think I have to note the distinction between the long involved orations in favor of white upper class, middle class defendants who have suffered so much, as they have indeed, by the time they come to trial, and the short acceptant attitudes that the black and Puerto Rican defendants who come into this Court generally display and expect."
>
> "Gentlemen...that I firmly believe in is that we cannot have one law for the rich and one law for the poor...."

Whatever social motivations are an ingredient of the sentencing herein, it is respectfully submitted that the attitude displayed while sympathetic to the offender, nevertheless showed a generalized attitude in regard to status.

It will be noted that while Werner may have had a "middle class background" Ezrine received the same term as the appellant did. Ezrine, it will be recalled, was the lawyer.

It is submitted that the appellant should be resentenced. In U.S. v. Baker, 487 F.2d 360, (Cir. 2d, 1973) at page 361 it was stated:

> "We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant. This applies to statements reflectinga policy of never incarcerating,as well as to a policy of always imprisoning."

POINT VII:

THE EVIDENCE ESTABLISHED THAT THE APPELLANT ACTED IN GOOD FAITH AND BELIEVED IN THE LEGALITY AND PROPRIETY OF THE PUBLIC OFFERING AND THIS RAISED A REASONABLE DOUBT AS TO GUILT.

On one hand, this Court will view the evidence in the light most favorable to the Government. However, in so doing, this Court must recongize that the appellant also testified. As was held in U.S. v. Johnson [Cir. 2d, 1975] slip opinion, April 1, 1975, 2673 at page 2675: "...; and taking into account the evidence presented by the defense as well as that presented by the Government...".

The appellant as a businessman had to deal with the complexities of the securities law; additionally, the appellant had to desist from violating the mail fraud statutes, 18 U.S.C. 1341.

It is submitted that the appellant's honest belief in the enterprise was a complete defense to all the charges. In Coleman v. U.S., 167 F.2d 837, [Cir. 5th, 142] it was held that the good faith of an accused is a complete defense to a charge of mail fraud. See also Sparrow v. U.S., 402 F.2d 826, [Cir. 10th, 1968]; which involved the honest belief or good faith of a defendant that a promotion was economically sound.

It is respectfully submitted that the same defense is available in regard to the counts involving the allegations of securities fraud. The appellant herein was totally unfamiliar with the area of securities laws.

Furthermore, if the appellant's defense of good faith is considered in regard to the substantive counts, it would equally apply to the conspiracy count. In other words in regard to conspiracy, there must be sufficient proof as to the criminal intent necessary to prove the violation of the substantive defenses; see Ingram v. U.S., 360 U.S. 672, at page 678 [1959].

In Frank v. United States, 220 F.2d 559 [10th Cir., 1955], the court held that the defendant, in attempting to establish good faith, was entitled to show that he relied on statements of others, which he believed to be true, in making representations to investors. Id at 563-64.

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED OR IN THE ALTERNATIVE THE APPELLANT RESENTENCED.

Respectfully submitted,

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